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IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NORTH CAROLINA, ASHEVILLE DIVISION

Civil Action No. 507

CAROLINA SCENIC COACH LINES, A CO-PARTNERSHIP,
Plaintiff,

vs.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,
Defendants

JURISDICTIONAL STATEMENT BY PLAINTIFF UNDER RULE 12 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES.

[Stamp:] Filed Sep. 1, 1944. Clerk, U. S. Dist Court

Plaintiff respectfully presents the following statement disclosing the basis upon which it is contended that the Supreme Court of the United States has jurisdiction upon appeal to review the final judgment or decree in the above-entitled cause sought to be reviewed.

A. Statutory Provisions

The statutory provisions believed to sustain the jurisdiction are:

U. S. C., Title 28, Section 47a (Act of March 3, 1911, c. 231, sec. 210, 36 Stat. 1150; as amended by Urgent Deficiencies Act of October 22, 1913; c. 32, 38 Stat. 220).

U. S. C., Title 28, Section 41 (28) (Act of June 18, 1910, c. 309, 36 Stat. 539; as amended March 3, 1911, c. 231, sec. 207, 36 Stat. 1148; October 22, 1913, c. 32, 38 Stat. 219).

U. S. C., Title 28, Section 44 (Act of October 22, 1913, c. 32, 38 Stat. 220; as amended by Act of February 13, 1925, c. 229, sec. 1, 43 Stat. 938).

U. S. C., Title 28, Section 47 (Act of October 22, 1913, c. 32, 38 Stat. 220).

U. S. C., Title 28, Section 345 (Act of March 3, 1891, c. 517, sec. 5, 26 Stat. 827; as amended January 20, 1897, c. 68, 29 Stat. 492; April 12, 1900, c. 191, sec. 35, 31 Stat. 85; April 30, 1900, c. 339, sec. 86, 31 Stat. 158; March 3, 1909, c. 269, sec. 1, 35 Stat. 838; March 3, 1911, c. 231, secs. 238, 244, 36 Stat. 1157; January 28, 1915, c. 22, sec. 2, 38 Stat. 804; February 13, 1925, c. 229, sec. 1, 43 Stat. 938).

B. Date of the Judgment or Decree Sought to Be Reviewed and the Date Upon Which the Application for Appeal Was Presented.

The decree sought to be reviewed was entered on July 21, 1944. The petition for appeal was presented and allowed on 9-27-44, together with an assignment of errors.

C. Nature of Cause and of Rulings Below

This is an appeal from a final decree of the District Court of the United States for the Western District of North Carolina, Asheville Division, entered July 21, 1944. By said decree the Court ordered, adjudged, and decreed that the injunction and other relief prayed for in the complaint be denied and that the suit be dismissed. By the said suit plaintiff had prayed the Court to restrain, enjoin, and suspend the operation, execution, and the effect and enforcement of an order of the Interstate Commerce Commission (Division 5), entered October 13, 1943, in its joint report

(mimeographed—not to be printed in full in the permanent series of motor-carrier reports of the Interstate Commerce Commission) in the proceedings entitled No. MC-14486 (Sub-No. 9), *McDuff Turner—Extension—Augusta, Ga.*, and No. MC-61598 (Sub-No. 9); *Smoky Mountain Stages, Inc.—Extension—Augusta, Ga.*, by the terms of which the Interstate Commerce Commission denied the application of this plaintiff for a certificate of public convenience and necessity authorizing the transportation, in interstate or foreign commerce, of passengers and their baggage, and of express, mail, and newspapers, over a described route between Clinton, S. C., and Augusta, Ga., and by the further terms of which the said Interstate Commerce Commission authorized issuance of a certificate of public convenience and necessity to Smoky Mountain Stages, Inc., to engage in the transportation, in interstate or foreign commerce, of passengers and their baggage, and of express, mail, and newspapers, between Clinton, S. C., and Augusta, Ga., over that same route.

Following the issuance of the said report of the Interstate Commerce Commission (Division 5), plaintiff filed its petition, dated November 24, 1943, praying that the entire membership of the Interstate Commerce Commission grant reconsideration, oral argument, or further hearing. The said petition was denied by the Interstate Commerce Commission on March 6, 1944, although in the meantime the effective date of the aforesaid order of the Commission was postponed from time to time. On August 9, 1944, the effective date of the order and the issuance of a certificate to Smoky Mountain Stages, Inc., were stayed by the Interstate Commerce Commission until August 28, 1944, pending the outcome of plaintiff's petition in the said District Court of the United States for the Western District of

North Carolina, Asheville Division, for a stay of the said order of the Interstate Commerce Commission and for stay of the issuance of a certificate of public convenience and necessity to Smoky Mountain Stages, Inc.

The principal grounds stated in the complaint in this Court are (a) that the Interstate Commerce Commission acted arbitrarily and capriciously, in excess of its statutory power, and contrary to the indisputable character of the evidence, in according to Smoky Mountain Stages, Inc., the operating rights sought, and (b) that the Interstate Commerce Commission acted contrary to the law in basing its decision on the record made before a Joint Board which was unlawfully constituted under the statute. The first of the two grounds is predicated principally upon the following errors of the Interstate Commerce Commission: (1) Its failure to find that there is no need for local passenger service over the proposed route in addition to that now adequately supplied by plaintiff or by other operators already in the field; (2) its finding that public convenience and necessity require operation over the proposed route as a "bridge" route between north Atlantic States and Florida; (3) its failure to take proper cognizance of the adverse effect of the proposed new operation on the existing operation of plaintiff; and (4) its failure to consider the condition of the proposed new route, particularly in relation to its contemplated use as part of a regular north-south highway.

The decision of the lower Court, if allowed to stand, would seem to establish the principle that findings by the Interstate Commerce Commission, merely because couched in the language of the statute, are sufficient in the absence of supporting findings of fact based upon evidence of

record. This is directly contrary to well-recognized principles of judicial review. *Florida* v. *United States*, 282 U. S. 194. Accordingly, it is important that this decision be reviewed.

D. Cases Sustaining the Jurisdiction of the Supreme Court of the United States on Appeal

Board of Trade of Kansas City v. *United States*, 314 U. S. 534.

Union Stock Yard Co. v. *United States*, 308 U. S. 213.

United States v. *Pan American Petroleum Corp.*, 304 U. S. 156.

United States v. *American Sheet & Tin Plate Co.*, 301 U. S. 402.

United States v. *Baltimore & Ohio R. R. Co.*, 293 U. S. 454.

Mississippi Valley Barge Co. v. *United States*, 292 U. S. 282.

Florida v. *United States*, 292 U. S. 1.

Tagg Bros. & Moorhead v. *United States*, 280 U. S. 420.

Assigned Car Cases, 274 U. S. 564.

Virginian Ry. v. *United States*, 272 U. S. 658.

Western Paper Makers' Chemical Co. v. *United States*, 271 U. S. 268.

Texas & Pacific Ry. Co. v. *United States*, 162 U. S. 197.

McDonald v. *Thompson*, 305 U. S. 263.

United States v. *Maher*, 307 U. S. 148.

E. Decree and Opinion of the District Court

Appended to this statement are copies of the opinion, findings of fact, conclusions of law, and final decree of the District Court.

Plaintiff, therefore, respectfully submits that the Supreme Court of the United States has jurisdiction of the appeal.

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APPENDIX A

[Stamp:] Filed July 21, 1944. Clerk, U. S. Dist. Court

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NORTH CAROLINA, ASHEVILLE DIVISION

Civil No. 507

CAROLINA SCENIC COACH LINES, a co-partnership, *Plaintiff*,

versus

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, *Defendants*

On Application for Injunction

(Argued July 10, 1944. Decided July 21, 1944)

Before Parker, Circuit Judge, and Webb and Hayes, District Judges

Monroe M. Redden, Wilmer A. Hill and Ames, Hill & Ames, for Carolina Scenic Coach Lines; Roberts & McInnis, James E. Wilson, Cherry & Hollowell and Edgar Turlington, for Smoky Mountain Stages, Inc.; Edward Dumbauld, Special Assistant to the Attorney General, Wendell Berge, Assistant Attorney General, and Theron L. Caudle, United States Attorney, for United States; Daniel W. Knowlton, Chief Counsel, Interstate Commerce Commision, and Allen Crenshaw, Attorney, Interstate Commerce Commission, for Interstate Commerce Commission.

PARKER, *Circuit Judge:*

This a suit under 28 U. S. C. A. 43-48 to set aside and enjoin an order of the Interstate Commerce Commission granting to Smoky Mountain Stages, Inc., hereafter referred to as "Stages", a certificate of public convenience and necessity, extending its authority as a public carrier of passengers by motor bus so as to authorize it to operate over a certain route between Clinton, S. C., and

Augusta, Ga. By the same order, the application of plaintiff, Carolina Scenic Coach Lines, hereafter referred to as "Scenic", for a certificate authorizing operation over the same route was denied. A special court of three judges has been convened pursuant to statute to hear the application for interlocutory injunction, the case has been heard upon the pleadings, the record made before the Commission and the briefs and arguments of counsel, and by consent of parties the cause has been submitted upon the merits for final decree.

Stages is associated with National Trailways system. It made application for the certificate authorizing operation between Clinton and Augusta, so as to close the link in the Trailways Line between the north and Florida points and to enable Trailways to compete with the Greyhound lines for this traffic. Scenic had been operating between Clinton and Augusta over a route slightly different for a portion of the way; but it was not associated with Trailways or with any other line which could adequately handle this traffic between the north and Florida points. When Stages filed its application, Scenic opposed it and filed application for a certificate over the same route, which Stages opposed. The Atlantic Greyhound Corporation also opposed the application of Stages. The Commission referred both applications, under sec. 205(a) of the Interstate Commerce Act, 49 U. S. C. A. 305(a), to a Joint Board of two members, one from each of the States of South Carolina and Georgia, the States through which the proposed route ran. The Joint Board heard evidence and made a report recommending that the application of Stages be granted and that of Scenic be denied. The matter then came on for hearing before Division 5 of the Commission, which made a thorough analysis of the evidence and wrote its own report, granting the application of Stages and denying that of Scenic. Appeal from this decision was taken to the entire Commission, in accordance with its rules, by petition which the Commission denied, thereby affirming the action of the Division.

It is clear from the record that the local traffic between Clinton and Augusta is a matter of little or no consequence

to either of the parties and that the applications here under consideration were made because of the importance of the North and South bridge traffic. Concerning this the Commission made the following statement in its report, which is amply sustained by the evidence before it:

> "At present Trailways has no system of through routes between points in eastern seaboard states and Florida. Persons desiring to travel by bus between such points are virtually dependent upon Greyhound which operates the so-called coast route. Traffic which Trailways' members originates at points on their routes north of Charlotte is transferred at that point to Greyhound, which completes the transportation through the Jacksonville gateway. Northbound traffic originating on the Greyhound Lines in Florida generally is not transferred to Trailways' members, Greyhound performing the entire transportation over its lines through Richmond, Washington, Baltimore, and points north. Thus Trailways' members participating in the transportation of Florida southbound traffic are practically excluded from obtaining Florida northbound traffic. If Stages' application is granted the last link in a chain of through routes of Trailways' members between northern points and Florida will be completed. In addition, the routes of Trailways' members run through west coast Florida points, providing a more direct service to and from such points than that rendered by Greyhound through the Jacksonville gateway. Aside from the direct benefit to the public in having available additional through motor bus facilities to and from Florida points, Trailways' members will be in a position to stimulate potential Florida traffic at points along their routes, resulting in increased revenue to them. Any detriment which Greyhound might suffer by reason of the establishment of another system of through routes is outweighed by the benefit to the public. Having concluded that there is a need for another through north-south service, there remains for consideration whether Scenic and Carolina Stages can accomplish the same

result over their present joint routes between Charlotte and Augusta.

"Scenic has been operating between Clintin and Augusta for many years, and also has available by reason of its connection with Carolina Stages a through route between Charlotte and Augusta, via Union, Newberry, and Saluda. It was not, however, until two weeks prior to the hearing herein that convenient connections and a more expeditious service between Charlotte and Augusta was instituted. The maintenance of a coordinated system of independent carriers, such as Trailways, requires cooperation and friendly relations between the various members. The inability in the past of Scenic and Carolina Stages and Trailways to reach a satisfactory agreement as to the placing of these carriers routes in the Trailways' system appears to have been the delaying factor in the establishment of the through route between Charlotte and Augusta and the cause of the filing of Stages' application. It is not indicated that future relations will be more harmonious.

"The granting of Stages' application will place it in a competitive situation with Scenic and Carolina Stages between Charlotte and Augusta and with Scenic between Clinton and Augusta. There is no showing, however, that any substantial traffic now is moving over the combined routes of Scenic and Carolina Stages between Charlotte and Augusta, and it is apparent that relatively little, if any, Florida traffic is handled over these routes. While Scenic has been operating between Clinton and Augusta for a long period of time serving most of the cities and towns on the proposed route, the latter route traverses 63.5 miles of highways not served by Scenic. Persons located on a large portion of such highways have no direct service to or from Clinton, Charlotte, or Augusta; and on 40.7 miles there is no bus service available.

"Stages anticipates that most of the traffic which it will transport over the proposed route will be 'bridge'

traffic, but it also wishes to be in a position to transport passengers traveling between points on the proposed route and points on the routes of Trailways' members. There is no evidence as to the amount, if any, of 'bridge' traffic which Scenic transports over its present route between Clinton and Augusta or the number of passengers moving between points on such route and points beyond. Scenic shows, however, that in April, 1941, it carried, on three schedules daily, 211 passengers from Clinton and points south thereof to Augusta, or an average of 2 passengers daily per schedule. It is clear, therefore, that the interstate traffic moving to or from points on such route provides only a small part of its revenue. While a portion of such traffic may be diverted to Stages if the latter's application is granted, any loss of traffic to Scenic would not be a sufficient reason to warrant a denial of Stages' application, when consideration is given to the benefit to be derived by the general public by having available the through routes between New York City and Florida points and points intermediate thereto. We believe that the best interests of the public will be served by granting Stages' application and denying that of Scenic."

We think there can be no question but that on these facts the order of the Commission was amply supported. What public convenience and necessity require in the premises is a matter which Congress has confided to the judgment of the Commission, and not of the courts, to determine. *C. & O. R. Co.* v. *United States* 283 U. S. 35, 41; *Board of Trade of Kansas City* v. *United States* 314 U. S. 539, 546; *United States* v. *Carolina Freight Carriers Corp.* 315 U. S. 475, 482, 490; *Bush Transfer, Inc.* v. *United States* 53 F. Supp. 640; *Virginia Stage Lines* v. *United States* 48 F. Supp. 79. And courts in reviewing orders made by the Commission in the exercise of the discretion reposed in it by Congress may not substitute their judgment for that of the Commission, nor may they set aside the orders unless they are made without substantial

evidence to support them, involve error of law or are so manifestly arbitrary and unreasonable as to transcend the power conferred by statute. The well settled rule was thus stated by this Court in the recent case of *Bondurant* v. *United States* 50 F. Supp. 704, 706:

> "We cannot say that the Commission's findings are not supported by the evidence, that they involve any error of law or that they are so arbitrary or unreasonable as to amount to an abuse of discretion. This being true, the relief prayed for must be denied. 'This court has no concern with the correctness of the Commission's reasoning, with the soundness of its conclusions, or with the alleged inconsistency with findings made in other proceedings before it'. Virginian Ry. *v.* United States 272 U. S. 658, 665, 666, 47 S. Ct. 222, 225, 71 L. Ed. 463; Interstate Commerce Commission *v.* Union Pac. R. Co., 222 U. S. 541, 32 S. Ct. 108, 56 L. Ed. 308."

See also the statement of the rule by another three-judge court of this Circuit in Anchor Coal Co. *v.* United States 25 F. 2d 462, 471, as follows:

> "If the determination of the Commission finds substantial support in the evidence, the courts will not weigh the evidence, nor consider the wisdom of the Commission's action, which, within the scope of its jurisdiction, is conclusive, unless there be some irregularity in the proceeding or some error in the application of rules of law. Chicago, R. I & Pac. Ry. *v.* U. S., 274 U. S. 29, 33, 47 S. Ct. 486, 71 L. Ed. 911; Virginian Ry. Co. *v.* U. S., 272 U. S. 658, 47 S. Ct. 222, 71 L. Ed. 463; Western Paper Makers' Chem. Co. *v.* U. S., 271 U. S. 268, 46 S. Ct. 500, 70 L. Ed. 941. If, however, in making the order complained of, the Commission has exceeded its powers, or has proceeded upon an erroneous theory of law, or if its action is so manifestly arbitrary and unreasonable as virtually to transcend the authority conferred upon it, the courts are not bound by its action. Southern Pac. Co. *v.* I. C. C. 219 U. S. 433, 31 S. Ct. 288, 55 L. Ed. 283; I. C. C. *v.*

> Union Pac. Co., 222 U. S. 541, 32 S. Ct. 108, 56 L. Ed. 308; U. S. *v.* N. Y. C. R. R., 263 U. S. 603, 44 S. Ct. 212, 68 L. Ed. 470; U. S. *v.* New River Co., 265 U. S. 533, 540, 44 S. Ct. 610, 68 L. Ed. 1165."

In the *Virginia Stages* case, supra, 48 F. Supp. 79, 83, which was much like this in that it involved a decision as to which of two competing bus lines was to have operating rights over a certain route, Judge Dobie stated the rule as follows:

> "The function of 'weighing' the evidence, therefore, remains peculiarly one for the Commission 'appointed by law and informed by experience', and not for the courts. Alton Railroad Company *v.* United States, 315 U. S. 15, 62 S. Ct. 432, 86 L. Ed. 586; Gray *v.* Powell, 314 U. S. 402, 62 S. Ct. 326, 86 L. Ed. 301. This is in accord with the realization that the regulation of transportation involves various economic factors and the exercise of an empirical judgment, since 'The stuff of the process is fluid and changing—the resultant of factors that must be valued as well as weighed. Congress has therefore delegated the enforcement of transportation policy to a permanent expert body and has charged it with the duty of being responsive to the dynamic character of transportation problems.' Board of Trade of Kansas City *v.* United States, 1942, 314 U. S. 534, 546, 62 S. Ct. 366, 372, 86 L. Ed. 432."

Scenic questions the validity of the order because there was an order of reference to the local board composed of members from the States of Georgia and South Carolina, but we see nothing in the point. The proposed route over which the certificate of convenience and necessity was asked ran through the States of Georgia and South Carolina; and the statute expressly provides for reference to such a board when "operations proposed to be conducted involved not more than three states". 49 U. S. C. A. 305(a). The fact that the bridge traffic would bring passengers from other states is immaterial, since the controlling consideration is the "operations proposed." But

even if there had been error in the matter, the record does not show that Scenic raised any objection thereto either before the Board or before the Commission, and it is too late to object for the first time in this Court. Furthermore, if objection had been made and sustained, the result would have been merely to give the Commission discretion whether to refer the matter to a Board for hearing or to hear it itself; and, since the Commission has heard the matter at large and filed an opinion giving its independent judgment on the case, it is not possible to see how Scenic has been hurt by the hearing before the Board, even if that hearing was not appropriate in the premises. Empire Trails *v.* United States 53 F. Supp. 373; North Coast Trans. Co. *v.* United States 54 F. Supp. 448.

For the reasons stated the injunction will be denied and the suit will be dismissed.

Injunction Denied and Suit Dismissed.

JOHN J. PARKER,
United States Circuit Judge,
Fourth Circuit.

E. Y. WEBB,
United States District Judge, Western
District of North Carolina.

JOHNSON J. HAYES,
United States District Judge, Middle
District of North Carolina.